IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11173

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

v.

THE PENFIELD COMPANY OF CALIFORNIA and A. W. YOUNG,
Appellees.

REPLY BRIEF FOR APPELLANT

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CITATIONS

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The essence of appellees' argument is that the refusal of the court below to enter a coercive decree calculated to enable the Commission to obtain the books and records of Penfield was proper because the court had been apprised in the course of a criminal trial involving these appellees and others (in which the court directed a verdict for some of the defendants, including the appellees) that the Government already had sufficient information as to the affairs of Penfield. Appellees' suggestion that the books covered by the Commission's subpoena were in fact available in the criminal trial is not only contrary to fact and without support in the record, as we shall show below, but inconsistent with appellees' two years' resistance to compliance with the Commission's subpoena. Nevertheless, appellees' argument

underlines and confirms what we understand to be the basic error underlying the decision of the court below, namely, the assumption that a district court has discretion to deny enforcement of the Commission's subpoena notwithstanding a prior enforcement order and the affirmance of that order on appeal. That the court lacked discretion to deny the Commission an effective enforcement decree appears not only from the authorities cited in our main brief but from *Parker* v. *United States*, 153 F. 2d 66 (C.C.A. 1, 1946), cited by appellees (Br. p. 8). That case fully sustains our position that the court below had no discretion under the circumstances but to issue a coercive decree. In that case the court order which had been disobeyed was an order to pay over a sum of money. Upon non-payment the contemnor was ordered committed until payment was made. The court said at page 70:

> "Proceedings in civil contempt are between the original parties and are instituted and tried as a part of the main cause. Though such proceedings are 'nominally those of contempt' (Worden v. Searls, 1887, 121 U.S. 14, 26, 7 S. Ct. 814, 820, 30 L. Ed. 853), the real purpose of the court order is purely remedial—to coerce obedience to a decree passed in complainant's favor, or to compensate complainant for loss caused by respondent's disobedience of such a decree. If imprisonment is imposed in civil contempt proceedings, it cannot be for a definite term. Gompers v. Bucks Stove & Range Co., supra, 221 U.S. at pages 442-444, 31 S. Ct. 492, 55 L. Ed. 797, 34 L.R.A., N.S., 874; In re Kahn, 2 Cir., 1913, 204 F. 581. *The respondent can only be imprisoned to compel his obedience to a decree. If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature.* If a compensatory fine is imposed, the purpose again is remedial, to make reparation to a complainant injured by respondent's disobedience of a court decree. While respondent may be confined to coerce payment of the compensatory fine, he must be released if he pays the fine or shows his utter inability to do so—confinement beyond that point

would be punitive, not remedial. If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled as of right to an order in civil contempt imposing a compensatory fine. Union Tool Co. v. Wilson, 1922, 259 U.S. 107, 42 S. Ct. 427, 66 L. Ed. 848; Enoch Morgan's Sons Co. v. Gibson, 8 Cir., 1903, 122 F. 420, 423; L. E. Waterman Co. v. Standard Drug Co., 6 Cir., 1913, 202 F. 167. *The court has no discretion to withhold the appropriate remedial order.* In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold punishment for the past act of disobedience." (Italics supplied.)

Appellees' contention that "the power to punish for contempt" is completely within the discretion of the district court and not reviewable by the complainant (Brief pp. 2-3, 6)—whatever its merit as applicable to criminal contempt—has absolutely no bearing on the issues presented in a civil contempt proceeding instituted by the Commission. Appellees' argument would make a mockery of the processes of review by an appellate court of a district court order in any proceeding designed to compel action by a defendant, since even a reversal of a district court order refusing the relief sought by the complainant would be nugatory if it were then left to the discretion of the district court whether to use its coercive process to require compliance with the order.

Even if the court had discretion to reconsider, in the light of the developments at the criminal trial, the right of the Commission to enforcement of its subpeona, we submit that there is a complete absence of support for such a reconsideration in Young's response to the order to show cause why he should not be adjudged in contempt (R. 77, 83). Nor is there any support therefor in the following colloquy between counsel and court (R. 86-7), which sets forth the only reasons given by the court below for not now enforcing the subpoena. That colloquy, which is set forth

in the margin,[1] reflects only an impression that "during one period of time this defendant [Young] had nothing whatsoever to do with the Penfield Company." Assuming the correctness of that observation, it would have absolutely no bearing upon Young's obligation as an officer of Penfield to produce the books of Penfield. Nor would it, of course, negative the possibility that upon obtaining access to Penfield's books further evidence would be revealed as to possible violations of law by Young as well as others.

At no point in the proceedings below did counsel for appellees make any claim that the records in question had been produced before the grand jury or in the trial of the criminal case.[2] Moreover, the statement of Assistant United

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[1] Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant [Young] had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

[2] There was no challenge to the statement of counsel for the Commission, made after the court below granted Young's motion to quash the grand jury subpoena of Penfield's records, that "There is not in this record one scintilla of evidence by affidavit or any other form from the mouth of Mr. Young [appellee] . . . why he has not complied with your Honor's order" (R. 51).

States Attorney Bell (who was representing the Government in connection with the attempt to enforce the grand jury subpoena) makes it clear that the United States Attorney and the grand jury had been unable to secure these records from appellees.[3]

In connection with appellees' comment regarding the Commission's application to this Court in the summer of 1944 to vacate the stay pending certiorari, it should be noted that the aforementioned statement of the Assistant United States Attorney verifies the fact that the Commission found it necessary to submit to the United States Attorney the results of an uncompleted investigation. The lack of the books and records of Penfield (R. 12-15), (to be distinguished from the records of the affiliated Bourbon company referred to by appellees (Br. p. 7)), may also be the reason for the gap in the evidence which in the opinion of the court below justified his granting of a motion for directed verdict of acquittal in the criminal case. Appellees obliquely give the impression (Brief, p. 4) that the Commission sought enforcement of the order of the district court only after the criminal trial was over. The record clearly shows the contrary.[4]

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[3] Mr. Bell: "In view of the fact that you have mentioned the criminal matter, I would like to say just one thing, namely, that, as I indicated during my own discussion, the investigation of the Grand Jury up to that time indicated there was quite a number of other defendants as to whom proof or evidence was inconclusive, showing that in their minds they needed additional evidence. Now, that evidence, one way or the other, whether it would or would not incriminate them, may be found in the books of the Penfield Company of California" (R. 75). Moreover, in harmony with the foregoing are counsel for appellees' repeated references to the records of Penfield as being "sought" (R. 33, 68).

[4] After the mandate of this Court came down (December 7, 1944) the Commission notified appellees and their counsel that it was still seeking access to said books and records, and upon refusal thereof the Commission, on January 24, 1945, sought a coercive contempt decree (R. 80-81). The delay in hearing the contempt application resulted from the exercise

Appellees have also sought to convey the impression that the contempt proceeding was mooted by the disposition of the criminal case referred to by appellees. It is clear that the latter case by no means fully comprehended the various objectives of the Commission's investigation, which is still uncompleted. Until the books in question are examined it will be impossible to determine what remedies—civil, administrative, or even criminal—are still open. In any case, it certainly comes with ill grace from appellees, whose contumaceous disobedience has caused the delay, to urge the possible fruitlessness of an examination of the books in question. On the contrary, it would seem that appellees' effort to profit from their own disobedience of the district court's order should emphasize the desirability of affording the Commission full scope in examining the records in question in furtherance of its investigation. A coercive decree for this purpose will by the same token make it manifest that orders of the courts cannot be flouted with impunity.

There is no merit to the "cross appeal" of appellees. They have no standing to appeal from the finding of contempt.[5] Moreover, the record clearly establishes that appellees were under a continuing obligation to produce the books and records in question from the time that this Court's mandate was spread on the records of the district

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by the court below of an assumed discretion to defer hearing of the contempt case on the merits until after the trial of the criminal case because of the objection of appellees that the records of the Penfield Company were being sought for use against them in the criminal case. As we have noted in our main brief (p. 9), that the records might have been so used afforded no justification for refusing to hear the contempt case on the merits with a view to enforcing the order of the court, and thereby upholding the respect to which judicial orders are entitled.

[5] Appellees filed no timely notice of appeal in the district court and therefore lost their right to appeal. *Fiske* v. *Wallace*, 115 F. 2d 1003 (C.C.A. 8, 1940), cert. denied 314 U.S. 663; *United Drug Co. v. Helvering*, 108 F. 2d 637, 639 (C.C.A. 2, 1940). Furthermore by paying the fine of $50 they acquiesced in the finding of contempt.

court, December 7, 1944 (R. 5, 80). Appellees and their counsel were obviously aware of the affirmance by this Court and the denial of their petition for certiorari. The record also shows that appellees and all of their counsel were given specific notice in writing that the Commission was still seeking the books and records in pursuance of the order of the district court (R. 9-10, 80). Appellees' counsel were present in the court below on several occasions in connection with the contempt proceedings and were put on notice of the demand for the books and records. Nevertheless, appellees have never tendered the books, but instead have persistently resisted their production.

Respectfully submitted,

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